

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 46 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

MOHAMADALI PANNUMIYA SAIYED

Versus

STATE OF GUJARAT

Appearance:

MR RAMNANDAN SINGH for Petitioner
Mr. R.M. Chauhan, APP for Respondent No. 1
SERVED for Respondent No. 2
MR SHAKEEL A QURESHI for Respondent No. 3, 4

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 26/12/97

ORAL JUDGEMENT

By this revision application, the original opponent challenges the judgment and order dated 30th october 1996 passed by the then learned Additional Sessions Judge at Mehsana in Criminal Revision Application No. 69/96 on his file, preferred for enhancement of the amount of maintenance awarded by the then learned Judicial Magistrate (F.C.) in Criminal Misc. Application No. 156/95 on his file.

2. The petitioner is the husband of opponent No.2.

The opponents No. 3 & 4 are the children of the petitioner and opponent No.2. Before about 17 to 18 years the petitioner and opponent No.2 married and during their married life, two sons the opponents No. 3 & 4 were born. Initially their married life was brooming over with pleasure, but later on dissension between the two arose. The brother of the opponent No.2 had married the sister of the applicant. Within short time because of the difference in ideology and life-style notions both could not pull on well, and both had reached to a point of no return, and re-vamping was not possible. With the intervention of their in-laws and elders the brother of opponent No.2, under the Muslim Law, divorced the sister of the applicant. Since then the difficulty arose breeding dissension between the two, as the petitioner believed that his sister was without any fault on her part divorced and so her miseries and woes were tremendous. He became volcanic and went to war with the opponent No.2 To have retaliation, he started to ill-treat the opponent No.2, but the opponent No.2 tolerated because she wanted to maintain the union not for her well-being alone, but also for the well-being of the children and the petitioner's family. However, her tolerance was considered to be the weakness and as alleged the applicant became more and more wicked. He continued to ill-treat her with vengeance and vendetta. Once at midnight the applicant at his nadir, drove the opponent No.2 out of his house. Being placed in helplessness & odd situation at midnight she was puzzled and was experiencing consternation, but she had to take on the chin. Mohammedbhai Husenbhai and Bariasali Ahmedali to her good luck helped her and escorted her to her natal house. Since then she has been residing at her brother's place because her father is living in Pakistan. The applicant thereafter took no care of the opponents No. 2 to 4 though he was under an obligation in law to maintain them. The opponent No.2 was having no income to maintain her & her minor children. She was fully dependent upon her brother having insufficient income to maintain all in the family. She therefore filed Criminal Misc. Application No. 156 of 1995 in the court of the Chief Judicial Magistrate at Mehsana for maintenance invoking Section 125 of the Criminal Procedure Code. The application was then assigned to the then ld. 3rd Joint Judicial Magistrate (F.C.) at Mehsana for hearing and disposal in accordance with law. Hearing the parties, the learned Magistrate found that neglect and refusal to maintain was established; and assessing income of the applicant at Rs. 10,000/- & more per month, he ordered

the applicant to pay Rs. 350/- p.m. to the opponent No.2, Rs.150/- per month to opponent No.3 and Rs.100/per month to opponent No.4, in all Rs.600/- per month by way of maintenance.

3. Being aggrieved by such decision, the opponent No.2 preferred revision application being Criminal Revision Application No. 69/96 before the Sessions Court at Mehsana for enhancement. It was submitted before the learned Additional Sessions Judge who was assigned with the matter for hearing and disposal as per law that the applicant was a Mujavir and was earning Rs. 4,000/- to 5,000/- per month. Over and above his such income he was having the rickshaw and by plying the rickshaw he was earning Rs. 1,500/- per month i.e., Rs.50/- per day. The applicant was also having a shop which was let to a tenant and the rental income thereof was about Rs.300/per month. Thus when the applicant was earning a pot of money it was not at all just and proper on the part of the lower court to award the amount of maintenance at the rate of Rs.600/per month which could be said to be meagre. Looking to the income the lower court ought to have awarded at least Rs. 500/- per month to each of the applicants. The learned Additional Sessions Judge at Mehsana, hearing the parties, enhanced the amount of maintenance. He awarded the amount of maintenance at the rate of Rs. 400/- to the opponent No.2 and Rs. 300/per month to each of the opponents No. 3 & 4. The applicant being aggrieved has therefore challenged the order of enhancement passed by the learned Additional Sessions Judge at Mehsana preferring this application.

4. It is contended on behalf of the applicant that there is no evidence indicating that the applicant is having income of Rs. 10,000/- or more as alleged by the opponent No.2. No doubt the applicant is a Mujavir, but his income per month can never be more than Rs.700/- per month. He did not have the rental income, and even at present also he does not have. The applicant was not having the rickshaw and therefore he does not have any income by plying the rickshaw. Considering the income of Rs. 700/- per month to be the base, the learned Additional Sessions Judge ought to have awarded the amount of maintenance, or ought to have maintained the order passed by the learned Magistrate. It is also the submission of the applicant that opponent No.4 never resided with the opponent No.2. Right from the day the dissension arose he has been residing with the applicant, and therefore the opponent No.4 being maintained by the applicant is entitled to no amount of maintenance. Whatever maintenance in his favour has been awarded is

required to be quashed and set aside. In order to show that the opponent No.4 resides with him he once on 8th April 1997 brought his son before this court (Coram: Mr. N.N. Mathur, J.) and again before me on 19th December 1997. On such fact, therefore, it is vehemently argued that there was neither any justification on the part of the learned Additional Sessions Judge to maintain the order of maintenance qua the opponent No.4, nor to enhance the amount of maintenance.

5. The learned advocate representing the opponents No. 2 to 4 has supported the order and urged to dismiss this revision application. The learned A.P.P. has submitted to pass the order that may be deemed fit in the circumstances of the case.

6. So far as neglect and refusal to maintain is concerned, I entirely agree with both the courts below. When I generally agree with them, it is not necessary to restate those reasonings again, but suffice it to say that the time, at which the petitioner has been driven out namely the midnight, speaks volume against the applicant indicating that to retaliate because of the strained relations that developed between his sister and brother of opponent No.2 which culminated into divorce, he as stated above did not treat the opponent No.2 well and later on as a last resort at midnight leaving her to miseries and woes drove her out. Such circumstance is the strongest circumstance on record indicating neglect and refusal to maintain on his part. Of course, that point is not pressed before me and therefore it would not be necessary for me to deal with the same in details. I will now switch over to the amount of quantum of maintenance fixed by the ld. Additional Sessions Judge.

7. Ordinarily in such cases, while fixing the amount of maintenance the court must bear in mind the income of the party liable to pay maintenance in law because the amount of maintenance must be commensurating with the income of that party regardless of the prices of the essential commodities prevailing in the market or the rate of dearness in the market, is showing upward tendency. The party who is in law bound to maintain has also to keep his body and soul together. The amount of maintenance therefore cannot be fixed disproportionately high because the party liable to pay maintenance in law is not expected to be the insolvent, or raise a loan or starve or beg. Further the party claiming compensation is under obligation to make suitable adjustments in his life style and eke out with what he can reasonably get. In this case, therefore, the income of the applicant is

the decisive factor and that should be made the base while fixing the amount of maintenance.

8. As stated above, the opponent No.2 has come forward with the say of applicant's exuberance but she has not led the evidence to establish high income she alleges. When no evidence in support of one's own say is led by the party asserting certain income, and the other side has also not led the evidence about his real income, the court will be justified in drawing reasonable inference considering the occupation of the party in law liable to pay compensation or his nature of work. Admittedly, in this case, the applicant is a Mujavir in village Unava in Mehsana District. As submitted before me, the population of that village is about 5000, of them the population of Muslims is around 2000 to 3000. There are about 500 Mujavirs in the village because it is a place of pilgrimage for Muslims where the Muslims from different parts of the State come to discharge their vows and perform religious rites. By rendering the services to the pilgrimage for rituals the Mujavirs are earning. Looking to the population as well as the numbers of the Mujavirs & pilgrims it can reasonably be assumed that the income of the applicant can be assessed at Rs.1,000/- which no one is able to refute. So far as rickshaw driving is concerned, it appears that formerly the applicant was having the rickshaw and was plying the same. To hood-wink the opponent No.2 as submitted by Mr. Qureshi the learned advocate transferred the same to his brother; the transfer is sham & bogus. He must therefore be earning deducting all expenses at least Rs. 700/- per month keeping in mind the pilgrims coming to the village daily. There is no evidence about the shop having been owned and let to the tenant by the applicant. No evidence about rate of rent in the locality and rent collected is led. It would not be therefore just and proper even to reasonably assume the rental income. In this case on the aforesaid grounds the income of the applicant can be assessed at Rs. 1,700/per month. For fixing the quantum of maintenance the same should be made the base. It seems the learned Additional Sessions Judge has overlooked this factor and preferred to fix the amount of compensation without any just base. He simply assessed the amounts of compensation solely on the basis of the rates of dearness and what a man would require to maintain when prices of the commodities are soaring, which is not just and cannot be in view of the above stated principle in law accepted.

9. The applicant has to maintain himself and over and above himself he has to maintain the opponents No.

2, 3 & 4 being his wife and children. He has married again under his personal law. He has also to maintain his second wife and also his father and mother. In all therefore he has to maintain seven persons and therefore keeping such number of dependents in mind the amount of compensation has to be fixed. When accordingly the amount of compensation are required to be fixed, in my view there was no justification for the learned Additional Sessions Judge to enhance the amounts of maintenance. Whatever the learned Judicial Magistrate has fixed commensurating with such income is quite just & proper. In this case, therefore, whatever has been fixed by the ld. Additional Sessions Judge being unjust, ill-based and inapt is required to be interfered with, and whatever is fixed by the learned J.M.F.C. is required to be restored.

10. At this stage, the learned advocate for the petitioner submits that the opponent No.4 resides with the applicant and therefore whatever has been awarded in his favour is required to be set aside. The contention gains no ground to stand upon. No doubt, the applicant has come forward with the say that opponent No.4 resides with him, he is maintaining himself, occasionally, or routinely he goes to see his mother the opponent No.2, his mother the opponent No.2 has to bear no expenses for his maintenance and he has shouldered the liability and he satisfies all the requirements of opponent No.4. His such case does not find favour when the evidence on record is perused. The applicant has in his evidence (Ex.33) made it clear that the children are residing with the opponent No.2, and he spends for the clothes, or notebooks and books required for education. In view of his such clear admission, his case about the opponent No.4 being maintained by him cannot be accepted. Of course he is spending for the clothes and books which is not a routine but casual. He might be spending as and when that need arose. Every day's requirements are otherwise satisfied by the brother of the opponent No.2. When he is accordingly spending he is entitled to some concession while fixing the amount of compensation and it seems the learned JMFC has considering that aspect fixed the amount of maintenance at Rs. 100/-and has not placed him at par with opponent No.3. In view of such matter, there is no necessity or justification to set aside the order of maintenance which is passed in favour of opponent No.4. If at all the application thinks that he is not entitled to pay the amount of maintenance because opponent No.4 resides with him it would be open to him to file appropriate application before the J.M.F.C. for reduction in the amount of compensation for which he will

have to lead necessary evidence and establish his case. No doubt he has brought the opponent No.4 before this court twice, but that will not be a ground to hold that opponent No.4 resides with him right from the day dissension between him and opponent No.2 arose as the abovereferred evidence indicates otherwise. There is also no evidence on record from what day the opponent No.4 resides with him. In the absence of such evidence, it would not be just and proper to modify or alter the finding of the ld. JMFC in that regard.

10. True, that in revision, I cannot ordinarily interfere with the decision of the lower court unless I find that the court below has led itself into err of law. In this case, error of law has been committed by the ld. Additional Sessions Judge while appreciating the evidence. If the evidence is not correctly appreciated it is the error of law. For the reasons stated hereinabove, the evidence on record while fixing the quantum of compensation is not correctly appreciated. When that error of law has been committed by the ld. Additional Sessions Judge, it is open to this court to interfere with the same in revision and set the things right.

11. For the aforesaid reasons, this revision application is required to be allowed. It is allowed accordingly. The order of the learned Additional Sessions Judge at Mehsana, enhancing the amounts of maintenance in Criminal Revision Application No. 69/96 is hereby set aside. The judgment and order passed by the 3rd Court's learned Judicial Magistrate (F.C.) at Mehsana in Criminal Misc. Application No. 156/95 fixing the amounts of maintenance is maintained. No costs in the circumstances of the case. Rule accordingly made absolute.

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